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Supreme Court of the United States

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NUMBER 808

LEONARD W. GUNZBURG,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

———— TERM

NUMBER ————

LEONARD W. GUNZBURG,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI

TO

THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Leonard W. Gunzburg prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the Case entitled "United States of America v. Leonard W. Gunzburg," Number 18,727 of the Docket of the United States Court of Appeals for the Fifth Circuit on the 12th day of January 1962, rehearing applied for on February 2, 1962 and denied February 22, 1962.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported, however, a copy is attached hereto as Appendix A.

Jurisdiction of this Court is predicated on 28 USC 1254.

The decision of the United States Court of Appeals for the Fifth Circuit is final because there is no further action possible after the rehearing has been denied.

The United States Court of Appeals for the Fifth Circuit has granted a stay of mandate for thirty days after February 22, 1962, which was the date of its judgment refusing to grant a rehearing.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Trial Court erred in admitting any evidence in support of one portion of a count of the indictment when the proof offered constituted a fatal variance between the goods described in said portion of the indictment and those offered in evidence.

2. Whether the Trial Court erred in refusing to grant Appellants motion for a verdict of acquittal because there was not substantial evidence upon which a verdict of guilty could be based and said verdict was contrary to the law and the evidence.

STATEMENT OF THE CASE

Petitioner, Leonard W. Gunzburg, was convicted on one count of a three-count indictment in the United States District Court for the Eastern District of Louisiana, New Orleans Division. The count upon which he was convicted was for concealing assets from his trustee in bankruptcy. He was acquitted upon two other counts based upon alleged use of the mails to defraud in connection with the furnishing of certain credit statements.

Appellant operated a rather large jewelry business at 139 Baronne Street in New Orleans, doing business under the trade name of "Manners Jewelers". He filed a voluntary petition in bankruptcy on March 31, 1958, and was adjudicated a bankrupt on the same date. (R. p. 2.) On April 18, 1958, Ingard Johannesen was qualified as receiver in bankruptcy and on May 23, 1958, he was elected as trustee in bankruptcy. (R. p. 2.)

The offense of concealment of certain diamond rings, watches, and ring mountings is alleged to have continued from on or about April 18, 1958, to February 8, 1960. (R. p. 2, 3.)

The first count of the indictment (the only count upon which petitioner was convicted) charged the concealment from the trustee of an assortment of ring mountings, rings and six watches. (R. pp. 2-5, inclusive.) There were no serial numbers or other positive marks of identification upon any of the ring mountings or rings (R. p. 179) and as to the watches, although they may have borne a number on the watch movement, no records were kept by the vendor and no attempt was made to identify the watches by any serial number on the watch movement or by any other positive mark of identification. (R. pp. 158, 159.) The method of proof offered by the government as to concealment was simply this: A salesman representing three companies which had sold a volume of similar goods to appellant over a period of many years was produced as a witness and, with the aid of a mass of invoices, this witness attempted to prove that the contested items produced at the trial were identical with those shown on the invoices.

His obvious inability to make any positive identification is discussed hereinafter.

The principal proof as to actual concealment consisted of the testimony of the salesman, Cecil Shelton, and a competitor, Leo Miller, Jr. Both of these parties testified that they had examined the stock of the bankrupt before it was sold at auction and that the contested items, allegedly concealed, were not among the stock offered for sale.

After petitioner went bankrupt his half sister, a Mrs. Felson, and two other parties not related to appellant, formed a corporation (R. pp. 510, 511, 512) and continued the business at the same location under the name of "Manners Jewelers, Incorporated." Petitioner testified that some 90 per cent of the stock and fixtures was bought by a representative of the corporation at the auction sale (R. p. 510) and this was corroborated by the trustee (R. p. 238). Petitioner became manager of the store but owned no stock. (R. p. 512)

The contested items allegedly concealed were supposedly seen on display in the very same store by Shelton. A search warrant was issued and served upon petitioner, who was then manager of the store being operated by the corporation. The contested items were then seized as evidence and another assortment of ring mountings allegedly concealed was located at the Canal Jewelry Company, where they had been pledged as a loan by the corporation.

The trustee, Johannesen, testified that as soon as he was appointed receiver the petitioner turned over to him the keys to the store and the combination to the store safe.

(R. p. 218) He also testified that a safety deposit box was then rented in the Whitney Bank and numerous rings were kept there. (R. p. 218) The remainder of the jewelry was kept at the store in various locations, some in the store safe, some in the layaway and repair departments and other items remained on shelves and in showcases.

Petitioner had filed a voluntary petition in bankruptcy to avoid threatened seizures by creditors and in the rush to do so was unable to complete the necessary schedules and obtained a delay for the purpose of doing so. (R. pp. 242, 243.) He and his staff worked around the clock Sunday to complete the store inventory but were unable to do so. This inventory was never completed, but at the time it was stopped the stock totaled approximately $140,000. (R. p. 548.)

After Johannesen had taken over the control of the store and stock petitioner's attorney requested that he be permitted to complete his inventory which was necessary in order to complete his bankruptcy schedules. This was agreed to by the trustee and petitioner came to the store a number of times during a period of approximately two weeks to complete his inventory. (R. p. 242.)

In order to appreciate the confusion which prevailed and the possibilities of honest oversight the following facts must be noted:

(1) There was so great a volume of merchandise that three appraisers were required, instead of one or two. (R. p. 267.)

(2) The taking of the inventory by the appraisers in the bankruptcy proceeding consumed eight days. (R. p. 267.)

(3) The stock was kept at different locations, namely:

(a) A safety deposit box at the Whitney Bank;

(b) The safe at the store;

(c) Various locations downstairs in the store; and

(d) Upstairs at the store in the layaway and repair departments.

(4) After the bankruptcy sale FOUR DIAMOND WATCHES WERE FOUND BY BOBBY FRANCOIS, AN EMPLOYEE OF THE STORE, IN A DISPLAY WINDOW UNDER A "BUILDUP." (R. pp. 415 through 418, inclusive.) These watches were turned over to petitioner and he admittedly placed them in the safe as being the rightful property of the corporation, which had purchased the entire contents of the window section involved. (R. pp. 541, 542.)

(5) A considerable volume of stock, contained in boxes, *were never examined but were sold in lots.* (R. pp. 289, 291.)

(6) One of the three appraisers had died before the trial. (R. p. 261.)

(7) After the bankruptcy, the new corporation which had bought most of the stock at the bankruptcy

sale later bought out all of the stock of six other small jewelry concerns and these items were mingled with everything else at the store being run by the corporation. (R. pp. 557 through 595.) These perfectly legitimate acquisitions of stock, therefore, could account for the presence of many of the contested items in the store or under its control.

(8) NOT A SINGLE ITEM ALLEGEDLY CONCEALED WAS POSITIVELY IDENTIFIED BY SERIAL NUMBER OR OTHER MARK, RELIANCE BEING MADE ENTIRELY ON THE MEMORY OF A SALESMAN OR COMPETITOR AND COMPARISON WITH INVOICES AND APPARENT VALUES. (This point documented in detail in argument.)

(9) All of the remaining layaway and repair items not claimed by the customers were sold in a lot at the auction to Mrs. Felson, petitioner's half sister. (R. pp. 238, 510.) Although these layaway and repair items had been available for inspection before the sale, they were sold in a lot without opening the envelopes for inspection. (R. p. 536.) Moreover, as noted hereinafter, no attempt was made by the government to show from its inventory list describing said layaway and repair items that said list did not include the contested items allegedly concealed.

The court of the first instance in this case was the United States District Court for the Eastern District of Louisiana, New Orleans Division. Said court had jurisdiction for the

reason that petitioner was charged with the violation of a federal statute, to-wit, 18 U.S.C. 152, pertinent portion of which reads as follows:

> "Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt***shall be fined not more than Five Thousand Dollars or imprisoned not more than five years or both.'"

ARGUMENT.

We address ourselves first to specifications of error number one, the fatal variance between the allegations of subparagraph B of count one and the proof offered. This subparagraph B of count one charges appellant with having concealed (R. p. 4):

> "(B) Two (2) diamond ring mountings, shipped or otherwise delivered to Leonard W. Gunzburg, d/b/a Manners Jewelers at 139 Baronne Street, New Orleans, Louisiana, by Delta Jewelry Corporation, 64 W. 48th Street, New York, New York;
>
> "Twelve (12) sets of diamond ring mountings, each set consisting of one engagement ring and one wedding ring, shipped or otherwise delivered to Leonard W. Gunzburg, d/b/a Manners Jewelers at 139 Baronne Street, New Orleans, Louisiana, by Advanced Ring Manufacturer, Inc., 145 W. 45th Street, New York, New York;
>
> "WHICH ARTICLES WERE PLEDGED BY LEONARD W. GUNZBURG d/b/a MANNERS

JEWELERS, INC., AT 139 BARONNE STREET, NEW ORLEANS, LOUISIANA, TO CANAL JEWELRY COMPANY, 914 CANAL STREET, NEW ORLENS, LOUISIANA, AS SECURITY FOR A LOAN *ON OR ABOUT JUNE 11, 1958*, AND WAS INSPECTED BY UNITED STATES AGENTS ON FEBRUARY 8, 1960." (Emphasis added.)

Appellant went to trial, therefore, prepared to account for an assortment of ring mountings which had allegedly been pledged to Canal Jewelry Company on *June 11, 1958*, but the government offered in sole support of subparagraph B of the indictment, a set of rings said to have been *pledged to the same company more than a year and a half later*, namely, on *January 28, 1960*. (R. p. 66.) Moreover, the evidence offered did not consist of "ring mountings" but contained *diamond rings fully set with stones*. (R. p. 64.)

The package of diamond rings sought to be offered was identified as G-47A and G-47B. (R. p. 62.)

Counsel for appellant objected to the offer of this jewelry in evidence as follows (R. p. 66):

"If the court please, we are going to object to any further testimony in connection with this alleged pledge and ask that the testimony be stricken for the reason that it is completely at variance with the allegations of the indictment. According to Mr. Berger's testimony, this loan was made January 28, 1960; the offense alleged in the indictment, that is, the alleged pledging to Mr. Berger's company of this jewelry, is alleged as

June 11, 1958, which is at least a year and a half difference.

"THE COURT: Would you repeat that? I don't see June 11 in here.

MR. DYMOND: Yes, sir, on the second page of the indictment, the second paragraph from the bottom; June 11, 1958, as the date of the pledge.

"MR. WELLER: I don't see it either."

After counsel for appellant was proven correct in his contention as to the date charged relative to the making of the pledge, the Court overruled the objection in the following words (R. pp. 66, 67):

"THE COURT: I overrule the objection. I don't think that is a material allegation as to the date."

We submit that the above variance of more than a year and a half was highly prejudical to appellant because the error or variance related, *not to the commission of the offense*, which was charged as having continued over a long period of time, but rather as to the identity of the goods which appellant was called upon to account for. There was no description whatever of the items in the indictment except the names of the vendors. As the record abundantly shows, appellant was, over a period of many years, purchasing similar goods from the same vendors in considerable volume. The date of the pledge, therefore, was the only tangible evidence whereby appellant *could positively identify the goods referred to in the indictment.*

The government very obviously realized the serious nature of the variance as to the year and a half error as to the date of the pledge with which the goods in this subparagraph were tied in. This is shown by the attempt by the United States Attorney to show that the pledge of January 28, 1960 *was the only one made by appellant* with the Canal Jewelry Company, which would, of course, have reduced the possibility that appellant was misled. This attempt, however, failed signally. Thus, we quote from the testimony of the government witness, Berger, after the confustion as to dates of the pledge had been objected to and overruled (R. p. 68):

"BY MR. WELLER:

Q. Mr. Berger, do your records reflect that Mr. Gunzburg *ever pledged any other jewelry* with you in return for a loan?

A. *Yes, he has.*

Q. When was that, looking at your records or if you don't need to - - -

A. WELL, I DON'T HAVE TO LOOK AT IT BECAUSE MR. GUNZBURG HAS BEEN MAKING LOANS FOR A NUMBER OF YEARS.

Q. I see. And do you recall any specific instance in which he pledged jewelry to you after March 31, 1958 - - pledged jewelry in return for a loan?

A. After March 31, 1958?

Q. Yes, aside from the instance here?

A. WELL, AT VARIOUS TIMES UP TO THE PRESENT TIME HE HAS MADE A NUMBER OF LOANS, always on jewelry, and he would redeem it, some of it was redeemed. SOME OF IT THAT WAS PLEDGED LATELY WE STILL HOLD."

The government witness, Berger, further testified *that appellant was such a steady loan customer that he was not even required* to sign a note, a pledge ticket alone being used (R. p. 67), and he was not even required to sign for the money (R. p. 71).

It is obvious, therefore, that the date of the pledge of the jewelry was all-important in enabling appellant *to determine the identity of the goods referred to in the indictment.* We submit that the variance of more than a year and a half definitely surpised appellant, prevented his preparing a defense as to the history of the items offered in evidence, and was highly prejudicial.

The variance, though permitted by the Court, was sufficiently bothersome to cause the Court to pause in the middle of his charge and comment upon it. (R. p. 690.)

THE LAW APPLICABLE

We submit that the law applicable to this situation is not to be found among those cases relating merely to a variation *as to the time of the offense*, wherein it is held that, generally, time alleged in the indictment need not be precisely proven. See *Hale v. U. S.*, 149 F. (2d) 401, C. C. A. 5 (1945).

We submit that the rule applicable here is the oftquoted statment of the Supreme Court of the United States in *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629. There the Supreme Court declared (page 630):

> "The true inquiry, therefore, is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused. The general rule that allegations and proof must correspond is based upon the obvious requirements, (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense. Bennett v. United States, 227 U. S. 333, 338, 33 S. Ct. 288, 57 L. Ed. 531; Harrison v. United States (C. C. A.), 200 F. 662, 673; United States v. Wills (C. C. A.), 36 F. (2d) 855, 856, 857. Cf. Hagner v. United States, 285 U. S. 427, 431-433, 52 S. Ct. 417, 76 L. Ed. 861."

In *Matthews v. United States, 15 F. (2d) 139*, the Court of Appeals for the Eighth Circuit state the test as to variance as follows (page 142):

> "Tests of fatal variance are: Was defendant misled? Will defendant be protected against a future proceeding? Bennett v. United States, 194 F. 630, 114 C. C. A. 402, affirmed 227 U. S. 333, 33 S. Ct. 288, 57 L. Ed. 531. Or as stated in Harrison v. United States, 200 F. 662, 673, 119 C. C. A. 78, 89: 'Upon the question of variance between indictment and proofs, the controlling consideration

should be whether the charge was fairly and fully enough stated to apprise defendant of what he must meet, and to protect him against another prosecution, and whether those particulars in which the proof may differ in form from the charge support the conclusion that respondent could have been misled to his injury.'"

We submit that in a case of this kind, where the principal problem was the identifying of numerous items of jewelry so as to trace their history, *the error of a year and a half as to the date of the alleged pledge was highly misleading and prejudical.*

See also *United States v. Kotteakos* 66 Supt. Ct. 1172.

NO EXPLANATION WAS OFFERED BY THE GOVERNMENT AS TO HOW THE ERROR WAS MADE.

ERROR No. 2

FAILURE TO DIRECT A VERDICT OF ACQUITTAL FOR LACK OF SUBSTANTIAL EVIDENCE.

Despite the volume of documentary evidence offered by the government (consisting largely of invoices from jewelry manufacturers), this proof was wholly inconclusive from a standpoint of logic and relevancy. All that this mass of invoices proved was that prior to the bankruptcy three firms had sold appellant a large quantity of similar merchandise.

Since neither the watches, the rings nor the ring mountings bore any serial number or positive mark of identifi-

cation, the actual connection between such invoice items and those physically offered in evidence was entirely speculative. As noted hereinafter, the attempt to identify the items produced in Court depended entirely upon the memory of a salesman, and this attempt proved ridiculous.

But the failure of the government to make out even a *prima facie* case is so obvious, from another aspect, that we might well "by-pass" the question as to whether or not the contested items were sold to appellant before the bankruptcy and to concede, *arguendo*, that they were.

Let us assume, for the sake of argument, that every item charged in the indictment was properly shown to have been sold and delivered to appellant prior to the bankruptcy and that every item charged should have been turned over by him to the trustee of the bankrupt estate. Even so, the government has failed signally to make out even a *prima facie* case as to concealment for the following reasons:

1. There was no showing whatever that the contested items were not included in the bankruptcy sale of the layaway and repair items. ALL OF THE LAYAWAY AND REPAIR ITEMS NOT CLAIMED AT THE TIME OF THE AUCTION SALE WERE SOLD IN EITHER ONE OR TWO LOTS, UNINSPECTED, TO MRS. FELSON.

Moreover, although the inventory of the layaway and repair items was produced in Court by the trustee under cross-examination, no attempt whatever was made by the government to check the descriptions of the items listed

against the contested items allegedly concealed so as to prove that the latter were not included. (R. p. 237.)

2. At the auction sale it is undisputed that none of the bidders examined the envelopes containing the layaway and repair items. They were assumed to have been inspected prior to the sale by anyone who wished to do so, BUT THE KEY WITNESS FOR THE GOVERNMENT, SHELTON, ADMITTED THAT HE DID NOT EXAMINE THE LAYAWAY OR REPAIR ITEMS. (R. p. 164.)

This failure to examine the layaway and repair items by prospective purchasers may well be understood when we realize that these items were being claimed by customers over an unspecified period of time and a prospective purchaser might not bother to inspect them on the theory that they would be reclaimed before the sale.

The contested items, therefore, could well have been sold in the lots of layaway and repair items AND SINCE MRS. FELSON'S REPRESENTATIVE BOUGHT THE ENTIRE LOT THIS WOULD HAVE ACCOUNTED FOR THEIR SHOWING UP IN THE POSSESSION OR CONTROL OF THE STORE IN WHICH SHE AND TWO OTHER STOCKHOLDERS CONTINUED THE BUSINESS.

TRUSTEE'S TESTIMONY WHOLLY INCONCLUSIVE.

Ingard Johannesen, the trustee, testified that appellant had given him the keys to the store and the combination to the safe in the store. (R. p. 218.) He states that the store safe contained a large quantity of jewelry including

diamond watches, "layaway" items and repair items. (R. p. 219.) The trustee also rented a safety deposit box at the Whiteney Bank in which the more valuable items were placed. (R. p. 220.) He testified that after the original surrender of property by appellant the latter brought him three or four additional boxes of rings and that he put them in the safety deposit box at the bank. (R. p. 220.)

The trustee stated that in his opinion *the total dollar value of the goods in the store safe exceeded that in the safety deposit box.* (R. p. 220.)

The trustee admitted that he did not inspect the premises of the store thoroughly. Thus (R. p. 232.):

> Q. Did you inspect the premises thoroughly of Manners Jewelers?
>
> A. Thoroughly? No, I wouldn't say I inspected it thoroughly. *I didn't move the items away.* I just went through the—the appraisal was done by other people than myself. *I just went through and looked the store over.* I got to know it pretty well from the number of times I went there with buyers and the fact that I stayed there for many times in order to give the lay-away and repair items out. *But they had the merchandise that was in the case or set on the floor, they were there just like when we sold it.*"

The trustee testified that all of the layaways were not claimed by the customers and that the remainder were sold at the bankruptcy auction sale. (R. pp. 232, 233.)

ON CROSS-EXAMINATION THE TRUSTEE RECALLED THAT THE LAYAWAY ITEMS AND REPAIR ITEMS REMAINING WERE SOLD IN ONE LOT TO MRS. FELSON (R. p. 238), APPELLANT'S HALF SISTER.

Although the trustee testified as to the inventory of the layaway and repair items *which contained a description of such items and presented it in Court, no attempt was made to show that any of the items allegedly concealed were not shown on said inventory.* (R. p. 237.)

This layaway and repair inventory had not been produced on direct examination but was obtained by the trustee during a recess. (R. p. 237.) Thereafter, no attempt was made by the government to negative the possibility that the items allegedly concealed corresponded to items on the said layaway and repair inventory. After producing this inventory and testifying in regard to it (and without making any attempt to negative the possibility that items on said inventory corresponded with items allegedly concealed), the trustee was allowed to leave the stand without a single question on redirect examination. (R. p. 244.)

Appellant testified that some of the rings offered in evidence could have appeared on the inventory in the form of ring mountings. (R. p. 535.)

We submit that it was part of the government's case to show that the layaway inventory did not contain any of the items with which appellant is charged as having concealed, and this is particularly so in view of the fact that

appellant's half sister, Mrs. Felson, bought all of the layaway and repair items in one lot. (R. p. 238.)

The failure of the government to even attempt to check out the layaway inventory against the items involved in the indictment is certainly a strong indication that it was impossible to prove from said inventory that some or all of the items involved in the indictment were not actually represented on said inventory.

TRUSTEE'S RECOLLECTIONS VERY VAGUE.

As the time of the trial the trustee had not examined the stock of the bankrupt since the date of the bankruptcy sale in June of 1958. (R. pp. 241, 242.) He was admittedly, therefore, testifying purely from memory as to which items he had seen in said stock.

As to the six watches allegedly concealed, he stated (R. pp. 221, 222):

> "Regarding the watches, from the design of the watch *I don't believe I had these six watches.* However, I am not positive about the three fourteen carat gold watches, I am positive that I did not have three platinum diamond watches of this type in my possession."

He admitted that among his inventory there was one platinum watch and that this was sold to appellant's half sister, Mrs. Felson, along with two other watches. He was unable, however, to identify the plantinum watch sold to Mrs. Felson. (R. p. 225.) Before looking at his records the trustee recalled that the one platinum watch sold had

been purchased by a man from Miami. (R. p. 225.) As noted, however, he was proven wrong on this and the trustee admitted that Mrs. Felson bought the platinum watch.

As to the ring stock, the trustee was able to point out only four items which he did not recall having seen in the bankrupt estate. (R. p. 227.) It will be noted, however, that in identifying these rings he was relying on the diamond settings (whereas the indictment relates exclusively the ring mountings). Thus, the trustee testified (R. p. 227):

> "A. These rings here—we had one ring of this nature and this type. The center diamond surrounded by the small stones and the reason I can remember is because it is a very unusual ring and I know I didn't have four of those.
>
> Q. You had one however?
>
> A. I had one I am almost sure.
>
> Q. Could it have been any of those four?
>
> A. It it could be."

On cross-examination the trustee was examined as to his recollection of ring mountings without center stones, as distinguished from completed rings with center stones. (R. p. 240.) The ring mountings, after all, were the items at issue, not the stones which were later placed in them by the time they were seized.

THE TRUSTEE WAS UNABLE TO TESTIFY, EVEN APPROXIMATELY, HOW MANY RING MOUNTINGS HE HAD SEEN IN THE BANKRUPT ESTATE WITHOUT CENTER STONES. (R. p. 240.) He was asked (R. p. 241):

> "Q. I see. Now what I am asking you, Mr. Johannesen, is whether you recall whether there were any mountings without center stones similar to the complete rings which were exhibited to you today and which you said you did not feel were among the stock.
>
> A. I don't think they had any mountings like that without the center stones in the stock that I had."

To sum up the trustee's testimony as to identification of any items allegedly concealed, therefore:

1. Relying solely on his memory he recalled that the stock turned over to him contained only one platinum watch, not three, and that this one platinum watch was sold to appellant's half sister;

2. Out of the entire assortment of ring mountings allegedly concealed he was able to pick out only four which he did not recall having seen and was not even positive about them.

We submit that the trustee's testimony was wholly inconclusive, particularly when we note that the only items as to which he testified with any certainty, namely, the platinum watches, can readily be accounted for by the testimony of Bobby Francois, who related how he had found

four watches after the bankruptcy sale which had become hidden under the "buildup" in the display window (R. p. 415.)

IN CONCLUSION ON THIS POINT IT WILL BE NOTED THAT THE GOVERNMENT MADE NO ATTEMPT WHATEVER TO COMPARE THE ITEMS ALLEGEDLY CONCEALED WITH THE INVENTORY OF THE BANKRUPT ESTATE. THE TOTAL OF ITEMS ALLEGEDLY CONCEALED CONSISTED OF 52 RING MOUNTINGS AND 6 LADIES WATCHES, PLUS 47 PACKAGES "CONTAINING APPROXIMATELY 280 RINGS." (R. pp. 3, 4, 5.)

The conclusion is, we submit, that the government realized that there were numerous items upon the general inventory of the bankrupt estate which might have corresponded with the items allegedly concealed and therefore elected to make its proof purely on the testimony of this witness and that of two other parites, as vague as that might be.

Considering the above, it seems obvious that the decision of the United States Circuit Court of Appeals for the Fifth Circuit is in conflict with the decision of the United States Supreme Court and of other United States Circuit Courts of Appeal on the subjects in question.

Your petitioner represents that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this Honorable Court should require the said case to be certified to it for its review

and determination, in conformity with the provisions of the Act of Congress in such cases made and provided.

Your petitioner therefore prays that a Writ of Certiorari be issued by this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this court, on a day certain, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case numbered and entitled on its docket, number 18,727, "Leonard W. Gunzburg, Appellant v. United States of America, Appellee", and that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and equitable.

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STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

F. IRVIN DYMOND,

who, being duly sworn, did depose and say:

That he is one of the counsel for Leonard W. Gunzburg, the petitioner in the foregoing petition for certiorari, that he prepared said petition and that the allegations thereof are true, as he verily believes.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS ..... DAY
OF MARCH, 1962.

NOTARY PUBLIC

CERTIFICATE

I hereby certify that a copy of this petition has been mailed, postage pre-paid, today to the Solicitor-General, Department of Justice, Washington 25, D. C., and, further, that a copy of same has been served upon Miss Kathleen Ruddell, United States Attorney for the Eastern District of Louisiana.

F. IRVIN DYMOND

APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18727

LEONARD W. GUNZBURG,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

In the United States District Court for the Eastern District of Louisiana.

(January 12, 1962)

Before TUTTLE, Chief Judge, POPE* and GEWIN, Circuit Judges.

TUTTLE, Chief Judge: Appellant, Leonard W. Gunzberg, was convicted of the offense of concealing assets from his trustee in bankruptcy. The primary question on this appeal is whether the evidence was sufficient to warrant submission of the case to the jury and, if so, whether it supports the jury's verdict.

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*Of the Ninth Circuit, sitting by designation.

For some time prior to March 31, 1958, appellant owned and operated a jewelry business in New Orleans, Louisiana, under the name of "Manners Jewelers." On March 31, 1958, he filed a voluntary petition in bankruptcy, and he was adjudicated a bankrupt on the same date. Ingard Johannesen was qualified as receiver in bankruptcy on April 18, 1958, and on May 23, 1958, Johannesen qualified as trustee in bankruptcy.

The entire stock of Manners Jewelers was ostensibly auctioned off on June 11, 1958. Prior to that date, the stock had been examined by appraisers, the trustee, jewelry salesmen and other diamond merchants. Approximately 90% of the stock was sold at the auction to a corporation which had been formed by appellant's half-sister and two other parties not related to appellant. This corporation continued to operate the jewelry business at the same location under the name of "Manners Jewelers, Incorporated." Appellant became manager for the store, although he owned no stock in the corporation.

In January 1960, Cecil Shelton, a jewelry salesman who sold large quantities of valuable watches and rings to Manners Jewelers before the bankruptcy, passed the store and allegedly discovered in the display window a number of these articles, none of which he recalled seeing among the stock offered at the auction. The items seen in the window by Shelton were seized by the Government, along with a number of other articles found among the stock in the store and among jewelry which had been pledged by appellant to another jewelry store as security for a loan. All told, appellant was charged with concealing 52 ring mountings, 6

ladies watches and approximately 280 rings, having an estimated total value of about $30,000.

Appellant claims that there was insufficient proof (1) that the contested items actually belonged to Manners Jewelers prior to the bankruptcy, or (2) that these items, assuming they were sold to Manners Jewelers prior to the bankruptcy, were not part of the inventory sold to the corporation at the auction sale.

As to the first contention, we think there was ample evidence to warrant a finding that the questioned jewelry was sold to appellant prior to the bankruptcy in March 1958. Cecil Shelton, who was the sole representative in the New Orleans area of the firms that manufactured these items of jewelry, positively identified them as items he had sold to Manners Jewelers before the bankruptcy. Indeed, Shelton was able to produce the pre-bankruptcy invoices listing every one of the contested items.

Shelton's identification of the jewelry was corroborated by the testimony of Bernard Simon of the Link-Simon Company. Simon identified the diamond ring settings as those which his company, through the Walter F. Bier Company represented by Shelton, had sold to Manners Jewelers before the bankruptcy.[1] Simon also produced pre-bankruptcy invoices listing the contested diamond ring settings.

Appellant made an effort, apparently not credited by the jury, to prove that the jewelry allegedly concealed was not

[1] Appellant obtained the diamond rings by placing an order with the Walter F. Bier Company for the mountings and having the Bier Company obtain the settings from the Link-Simon Company, a loose-diamond house.

sold to him by Shelton but came into his possession when the corporation bought out the stock of several small jewelry concerns after the bankruptcy. Appellant produced the invoices representing these transactions, but was unable to establish that the items listed on these invoices corresponded to the items which he was charged with concealing. On the basis of the testimony of Shelton and Simon, we think the jury was entitled to find that the contested items were not among the stock purchased by the corporation after the bankruptcy, but that they were sold by Shelton to appellant prior to the bankruptcy.

The second prong of appellant's attack on the evidence is grounded on the theory that the Government's proof was not sufficient to preclude a finding that the contested items were sold at the auction as part of the layaway and repair stock. We think otherwise. Most of the layaway and repair items were sold to appellant's half-sister for $1,350. Apart from the obvious difficulty which the jury must have had in trying to believe the $30,000 worth of jewelry was sold at auction for only $1,350, the jury also heard from various witnesses who testified that they examined the layaway and repair stock prior to the sale and that they did not see the contested items among this stock. On this record, the jury was certainly justified in concluding that the contested items were not sold at the bankruptcy sale as part of the layaway and repair stock.

In addition to his contention that the evidence fails to support the jury's verdict, appellant claims that reversal is required because of a variance between the indictment and the proof. Subparagraph B of the count of the indictment on which appellant was convicted charged with concealing

14 diamond ring mountings, which mountings, it was alleged, had been pledged to a certain jewelry store "on or about June 11, 1958." In support of subparagraph B, the Government offered in evidence a set of rings which had been pledged to the same jewelry store on January 28, 1960. Assuming, as appellant contends, that this constituted a variance and that the variance related "to the identity of the goods which appellant was called upon to account for," we are nevertheless satisfied that the variance did not prejudice appellant's substantial rights. Appellant was charged with concealing 52 ring mountings and numerous other items of jewelry. The variance related to only 14 of the ring mountings. As to all the other items, the proof corresponded with the allegations of the indictment and was sufficient, in itself, to support appellant's conviction for concealing assets from his trustee. Under these circumstances, the variance would not be grounds for reversing the conviction. *United States v. Wodiska*, 2nd Cir., 147 F. 2d 38.

We have carefully examined the record and conclude that it is free of error. The judgment of the District Court is, therefore,

AFFIRMED.

A true copy

Test:

EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit,
New Orleans, Louisiana

March 7, 1962

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CITATIONS

Case:

Berger v. *United States*, 295 U.S. 78 9

Statute:

18 U.S.C. 152 2

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 808

LEONARD W. GUNZBURG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 25-29) is reported at 297 F. 2d 829.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1962 (Pet. App. 25). A petition for rehearing was denied on February 22, 1962. The petition for a writ of certiorari was filed on March 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the petitioner's conviction for fraudulently concealing from a trustee in bankruptcy assets belonging to a bankrupt estate.

2. Whether there was a fatal variance between the indictment and the proof.

STATUTE INVOLVED

Section 152 of Title 18 U.S.C. provides in pertinent part:

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt;
>
> * * * *
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

After a trial by jury in the District Court for the Eastern District of Louisiana, the petitioner was convicted of fraudulently concealing assets of his bankrupt estate from the trustee in bankruptcy, in violation of 18 U.S.C. 152, *supra* (R. 2-7, 706, 710).[1] On November 18, 1960, he was sentenced to imprisonment

[1] The petitioner was acquitted by the jury on two counts of mail fraud (R. 5-7, 706, 709, 710).

for thirty months (R. 710). The conviction was affirmed on appeal (Pet. App. 25-29). 297 F. 2d 829.

The pertinent facts may be summarized as follows:

1. In early 1958, the petitioner operated a jewelry business in New Orleans, Louisiana, under the name "Manners Jewelers." On March 31, 1958, he filed a voluntary petition in bankruptcy and was adjudicated a bankrupt on the same day (R. 24-25, 37-39, 509, 610). In April 1958, a receiver in bankruptcy who was later designated trustee in bankruptcy was appointed, and three appraisers were designated to make an inventory and appraise the assets of the bankrupt estate (R. 25-28, 215). Thereafter, the assets of the bankrupt estate—including repair and "lay-away" items—were inventoried and appraised (R. 232, 234-236, 244, 261-262, 267, 284-285, 291).

In the meantime, one Cecil Shelton, who, as a sales representative of some custom jeweler firms, had supplied the petitioner with custom jewelry in the past, was instructed by his New York office to examine the stock of the bankrupt estate to see if there was "enough [stock] involved" in the proposed auction to warrant arrangements by the New York office to have someone present at the bidding (R. 135-136, 151). Shelton with the permission of the trustee examined all of the inventory except "lay-away" and repair items (R. 138, 147-150, 152-153, 160-165, 168).

On May 26, 1958, the bankruptcy court ordered the assets of the estate sold at public auction (R. 28). About 90% of the inventory was purchased in the name of the petitioner's half-sister for a corporation

which was being formed by the half-sister and others (R. 237-238, 510-511). The "lay-away" and repair items of jewelry which had not been picked up by respective customers were purchased for $1,350.00 in the name of the petitioner's half-sister for the corporation. Subsequently, "Manners Jewelers, Incorporated" was formed. The corporation took over the petitioner's former jewelry business, including its location, and retained the petitioner as store manager (R. 481, 512).

Early in 1960, Shelton noticed in the display window of "Manners Jewelers, Incorporated" some custom-made rings which he had supplied the petitioner prior to bankruptcy and which had not been included in the bankruptcy inventory (R. 92-104, 107-134, 137-145, 147-149). Shelton then contacted the F.B.I. On February 8, 1960, F.B.I. agents, armed with a search warrant, entered "Manners Jewelers, Incorporated". The agents seized a quantity of custom watches, rings and ring mountings inside the store and from among jewelry which the petitioner had pledged to another jewelry store as security for a loan (R. 42-44, 53-56, 64-65, 100-134, 137-145, 178-179). The indictment subsequently returned against the petitioner charged him with having concealed six watches, 69 ring mountings, and about 280 rings (R. 2-5).

2. Shelton testified at the trial that jewelry seized by the F.B.I. in 1960 and introduced into evidence was supplied by him to the petitioner prior to bankruptcy (R. 92-134, 139-143, 178-180). He said that he carefully examined two of the seized watches, and that, in his opinion, those items could not have been

"lay-away" or repair items (R. 166-167).[2] He said that he was the only representative who sold the particular brand of custom jewelry in his territory, which included Louisiana; that he could identify the jewelry by style characteristics and manufacturing process; and that his manufacturers employed unique and distinctive manufacturing designs on the jewelry (R. 124, 141, 176-180).

The trustee testified that he examined the premises of "Manners Jewelers" in connection with the bankruptcy proceedings and that most of the valuable items of jewelry were kept either in a nearby bank vault or in the store safe. He examined the contents of the vault and the safe about twelve times, and made an inventory of the stock in the store, including the "lay-away" and repair items (R. 218-221, 234-236). Of the jewelry seized by the F.B.I. in 1960, he said that he was "positive" that three platinum watches were not included in the bankruptcy inventory (R. 221-222). He identified some "very unusual" diamond rings as not having been included in the inventory (R. 226-227). One of the appraisers testified that certain rings seized by the F.B.I. were not included in the inventory of the bankrupt estate (R. 271-274, 281).

3. The petitioner testified that he did not conceal any jewelry or other assets from the trustee in bankruptcy (R. 537-540). He said that, subsequent to the bankruptcy sale, an employee found four plati-

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[2] As noted, Shelton, in his 1958 examination, had not seen the "lay-away" or repair items (R. 161).

num watches in a window section area of the store, and that he put those watches in the store safe as property of the corporation since the window section of the store was purchased for the corporation (R. 540-542; see R. 415). He testified that a "good deal" of the rings seized by the F.B.I. agents in 1960 were included in the bankruptcy inventory (R. 534-535). He said that some of those rings could have been in the store inventory, while others could have been in "lay-aways" and repairs (R. 535-537). Petitioner also testified that Shelton's line of rings was not unusual, that there were "a thousand wholesalers and manufacturers" who carried the "very same" watches and rings "in style, look, weight and color" (R. 522). He said that no jeweler could tell where a particular ring came from or pick out a "Delta" ring (Delta was one of Shelton's principals) from other rings (R. 522-523).

ARGUMENT

1. The petitioner contends (Pet. 14-22) that the evidence was insufficient to support the conviction because the government did not rebut the possibility that the contested items of jewelry could have been included in the "lay away" and repair inventory which was subsequently purchased for the corporation which took over petitioner's business. There was, however, ample evidence to support the jury's conclusion that the contested jewelry was not included within the "lay-away" and repair inventories.

As shown by the Statement, *supra*, pp. 3-4, the trustee notified the private individuals who had items

of jewelry in "lay-away" or repair stock to call for and redeem those items, and the balance of the "lay-away" and repair stock was sold to the petitioner's half-sister for $1,350 (R. 232-233, 238). It is inconceivable that the over 300 rings, ring mountings and watches in question, the mountings of which (without stones) had a *wholesale* value of about $12,000 to $14,000, could have been in the "lay-away" or repair inventories. The trustee and an appraiser testified that they had examined the "lay-away" and repair items and that certain watches and rings seized by the F.B.I. were not included in the bankruptcy inventory.[3]

2. The indictment charged the petitioner with the concealment of jewelry from the trustee in bankruptcy from April 18, 1958, to February 8, 1960. Subparagraph "B" of the count in question charged the petitioner with having concealed two "diamond ring mountings" supplied by the Delta Jewelry Corporation of New York and twelve "sets of diamond ring mountings" supplied by the Advanced Ring Company of New York, and with having pledged those items

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[3] In the court below, the petitioner also argued that the evidence was insufficient to show that the contested items of jewelry were supplied the petitioner prior to bankruptcy (see Pet. App. 27-28). In this Court, the petitioner concedes *arguendo* that the proof was sufficient to show that the jewelry in question was sold to him prior to bankruptcy (see Pet. 15). The proof showed that Shelton, corroborated by his own invoices and the testimony of another jewelry representative and his invoices, unequivocally identified the jewelry as that which had been supplied to petitioner before bankruptcy (R. 92-113, 196-212).

on a loan with the Canal Jewelry Company of New Orleans "on or about June 11, 1958" (R. 4). The proof showed that, on January 28, 1960, the petitioner had pledged 27 rings (with the stones) with the Canal Jewelry Company as collateral for a $5,000 loan (R. 64-68). The proprietor of the Canal Jewelry Company testified that the petitioner had in the past pledged jewelry as collateral for loans. On this basis, the petitioner contends that there was a "fatal variance" between the indictment and the proof since he was misled by the identity of the pledged goods (Pet. 8-14). There is no merit to the contention.

Petitioner was put on notice that he was charged with the concealment between April 18, 1958, and February 8, 1960, of a specified number of "diamond ring mountings" which had been supplied to him by certain ring manufacturers and had been pledged by him to the Canal Jewelry Company as security for a loan. That the petitioner had stones mounted in the ring mountings which he had acquired from the Advanced Ring and Delta Companies earlier—and that it was the mounted rings which had been pledged—did not detract from the fact that the petitioner had pledged the *mountings* in question, the precise items which he was charged with having concealed from his trustee. The error in the date of the pledge was not material since the pledge was not the illegal act charged; the statement in the indictment as to the pledge was merely an additional means of describing the items. The significant fact was that the mountings had been supplied to the petitioner prior to bankruptcy, and had not been included in

the bankruptcy inventory (R. 121-128). The fact that the items had been pledged after being concealed did not affect the essential facts of the offense of concealment—the proof of which was supplied by Shelton.

Moreover, the variance did not prejudice the petitioner's substantial rights because it related only to part of the assets. Petitioner was charged with having concealed, in addition, six watches, other ring mountings and about 280 rings (R. 2-5). As the court below pointed out (Pet. App. 29), "As to all the other items, the proof corresponded with the allegations of the indictment and was sufficient, in itself, to support appellant's conviction for concealing assets from his trustee. Under these circumstances, the variance would not be grounds for reversing the conviction. *United States* v. *Wodiska*, 2nd Cir., 147 F. 2d 38." See *Berger* v. *United States*, 295 U.S. 78.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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